Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1999

ROBERT DANIEL PARHAM,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTIONS PRESENTED

1. Whether the due process clause of the United States Constitution Amendment Fourteen permits a State to deny an inmate early release when the sole ground for denial is that a trial judge, due to clerical error, failed to execute the early release order within the statutory time limit?

2. Whether the equal protection clause of the United States Constitution Amendment Fourteen permits a State to deny early release of an inmate because a judge failed to execute the early release order within a statutory time limit; but the State permits inmates to be released outside of the statutory time limit when prison officials, because of administrative burdens, fail to act within the statutory time limit?

3. Whether the due process clause of the United States Constitution Amendment Fourteen permits a prisoner to be denied early release solely because of clerical error by a trial judge?

4. Whether a state rule of procedure which deprives a person of his freedom because of a trial judge's clerical error violates substantive due process?

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In The

Supreme Court of the United States

No.:_____

ROBERT DANIEL PARHAM,

Petitioner,

V.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT

OPINIONS BELOW

The unpublished opinion of Lee County Circuit Judge Frank Russell denying the State's request to vacate the order releasing Parham is attached as Appendix "A". The published opinion of the Mississippi Supreme Court sustaining the State's motion to vacate the order of release and directing the return of Parham to the state penitentiary is attached as Appendix "B".

JURISDICTION

This Court has jurisdiction to review the final decision of the Mississippi Supreme Court of September 24, 1998, by certiorari under 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

The statute involved is a Mississippi statute providing for a trial court's suspension of execution of sentences earlier imposed by the trial court. This statute is Miss. Code Ann. § 47-7-47, which provides in part:

> "(1) The judge of any circuit court may place an offender on a program of earned probation after a period of confinement as set out herein and the judge may seek the advice of the Commissioner of the Department of Corrections and shall direct that the defendant be under the supervision of the Department of Corrections.
>
> "(2) (a) Any circuit court or county court may, upon its own motion, acting upon the advice and consent of the Commissioner of the Department of Corrections at the time of the initial sentencing only, not earlier than thirty (30) days nor later than one hundred eighty (180) days after the defendant has been delivered to the custody of the Department of Corrections, to which he has been sentenced, suspend the further execution of the sentence and place the defendant on earned probation, except in a case

> where a death sentence or life imprisonment is the maximum penalty which may be imposed or if the defendant has been confined for the conviction of a felony on a previous occasion in any court or courts of the United States and of any state or territories thereof or has been convicted of a felony involving the use of a deadly weapon."

The constitutional provision involved is United States Constitution Amendment Fourteen, which provides in part:

> "...nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection under laws."

STATEMENT OF THE CASE

On December 1, 1992, Petitioner Parham entered a guilty plea to a charge of manslaughter. R., p. 47. Defense counsel told the sentencing judge (Frank Russell) that Parham "did have a defense", but he (Parham) "personally feels...he needs to be punished to help him get along with his life". R., p. 62.

As a factual basis for his plea of guilty, Parham told Judge Russell that his deceased wife had come home drinking. She had attacked him and they had struggled, after which she had gone to bed. The next day she was ill, and Petitioner tried repeatedly to persuade her to see a physician.

She refused, and she "kept saying she was going to be all right". R., pp. 60-61.

In the evening, however, she "quit breathing". After trying unsuccessfully to revive her, Parham transported her to the hospital where she died. R. 60-61, 65.

On January 8, 1993, Judge Russell sentenced Parham. In sentencing Petitioner to twenty (20) years imprisonment, with ten (10) years suspended, Judge Russell stated that "the Court reserves the right of judicial review"' R., p. 46.

The "right of judicial review" refers to an awkwardly-worded Mississippi statute, under which a trial court may suspend a prison sentence, and place the prisoner on probation, within one hundred eighty (180) days after the prisoner is delivered to the Department of Corrections. Miss. Code Ann. § 47-7-47.

On July 19, 1994, Judge Russell entered orders reconsidering and reviewing the sentence, and suspending execution of the remainder of the sentence. R., pp. 70-71.

About seven (7) months after Parham's release from prison, on February 15, 1995, the Mississippi Attorney General filed a petition to vacate Judge Russell's order suspending the remainder of Parham's sentence. The basis

for the Attorney General's motion was that the order suspending execution of the remainder of the sentence was executed after the one hundred eighty (180) day statutory time limit had expired. R., pp. 77-80. After considering the petition and statements of counsel for the State in support of the Petition, Circuit Court Judge Barry Ford, on March 13, 1995, denied the State's motion to vacate the sentence. R., p. 84.

The State did not appeal Judge Ford's order of March 13, 1995, refusing to vacate the order suspending execution of the remainder of the sentence. Instead, the State filed a new pleading with the Mississippi Supreme Court on September 26, 1995, requesting the trial judges be directed to vacate the order directing Parham's release. The Mississippi Supreme Court ordered a hearing be held on this new pleading before Judge Russell. R., p. 97.

The hearing on the State's petition requesting the re-incarceration of Parham was held before Circuit Judge Russell on January 24, 1996.

At the hearing before Judge Russell, evidence was produced that prisoners were frequently released by orders entered more than one hundred eighty (180) days after their

delivery to the Department of Corrections. In fact, statistical evidence indicated that since 1990 over fifty-six percent (56%) of all prisoners who were granted suspended sentences were given this relief by orders entered more than one hundred eighty (180) days after their initial incarceration. R., pp. 128-129; 139-140.

Mississippi Department of Corrections' officials testified at the hearing that the one hundred eighty (180) day limitation period was impractical, and that the necessary review of a prisoner's performance and circumstances could often not be completed within the one hundred eighty (180) day time limitation. R., p. 140.

In the present case, however, the untimely order releasing Mr. Parham was not due to failure of the Department of Corrections to complete the necessary review process. The Department of Corrections had completed the necessary review process, and had sent the documentation supporting the early release of Mr. Parham to Judge Russell. Through clerical error, Judge Russell failed to timely execute the release order. Upon realizing that he had "misplaced the paperwork", and failed to timely enter the release order, Judge Russell executed the order even though the one

hundred eighty (180) day time limit had expired. R., p. 147.

Parham then joined the one thousand one hundred ninety-four (1,194) inmates, who had been released outside of the one hundred eighty (180) day time limitation of Miss. Code Ann. § 47-7-47 since January 1, 1990. Exhibit "B" to Respondent's Mississippi Supreme Court Brief. The record contains no explanation for differing treatment between Parham and the other one thousand one hundred ninety-four (1,194) prisoners released early, except that the trial judge's error, not Department of Corrections' error, was the cause of the failure to comply with the statutory time limitation.

On February 1, 1996, Judge Russell entered his order denying the State's petition to vacate his order of release. Judge Russell echoed Parham's counsel's reliance upon Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), by stating:

> "Interestingly, the State accuses the Court of wrongdoing but seeks to have the defendant pay the price".

R., p. 143.

The State filed no appeal of Judge Russell's order denying its motion to vacate the order of Parham's release entered February 1, 1996. Instead, on April 5, 1996, the State

filed a "Notification of the Results of the Hearing ordered by Supreme Court...". In this pleading, the State asked the Court to reverse Judge Russell's opinion and to order Parham's re-incarceration.

On September 24, 1998, after Parham had been free for over three (3) years, the Mississippi Supreme Court, rendered its opinion finding that the order of Judge Russell directing Mr. Parham's release from prison was void because it was executed outside the one hundred eighty (180) day time period allowed by statute. Accordingly, the Mississippi Supreme Court directed Mr. Parham be "immediately returned to the custody of the Mississippi Department of Corrections".

ARGUMENT I

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE IMPORTANT DUE PROCESS ISSUE OF WHETHER A STATE MAY DENY A PERSON FREEDOM SOLELY BECAUSE OF CLERICAL ERROR OF A TRIAL JUDGE.

Robert Parham suffers continued loss of liberty solely because of clerical error by the trial judge. Because he misplaced applicable documents, the trial judge failed to

timely render his order directing the suspension of the remainder of Parham's sentence.

The Petition should be granted because denying liberty because of a state official's clerical error cannot be reconciled with this Court's decision in Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Logan precludes depriving a person of a due process right for failure of a state official to comply with a statutory time limitation.

In Logan, an Illinois statute provided a cause of action to those who are discharged from employment because of "physical...handicap unrelated to ability". Under the Illinois procedure, an administrative agency was to hold a hearing within one hundred twenty (120) days after a discharged employee filed a complaint that his rights had been violated under the statute. For reasons beyond the control of employee Logan, the Commission failed to hold a hearing within one hundred eighty (180) days. The Illinois Supreme Court dismissed the petitioner's claim on the grounds that the failure of the administrative tribunal to act within one hundred twenty (120) days destroyed his cause of action.

This Court held that the due process clause of the United

States Constitution Amendment Fourteen prohibited depriving one of due process rights for reasons outside his ability to control. This Court said:

> "...as our decisions have emphasized time and again, the 'due process clause grants the aggrieved party the opportunity to present its case and have its merits fairly judged'..."

102 S.Ct. at 1148.

There is no significant difference between Logan v. Zimmerman Brush Co. and this case except that this case presents an interest of a higher order than mere "property". Far more is involved than a mere claim for damages because of loss of a job. In this case, Petitioner has been denied his freedom because of administrative error of a State official. Under the merits of the controversy, Parham was entitled to his liberty. However, solely because of clerical error by the trial judge in failing to timely act, he has been denied his liberty. If due process is denied when a state agency, because of clerical error, fails to timely act on a request to be reinstated to a job, due process has likewise been denied when a person is denied his "liberty", when a trial judge, because of clerical error, fails to timely act upon a request for liberty.

By denying Parham relief, the Mississippi Supreme Court disregarded Logan v. Zimmerman Brush Co. To see that this Court's directives are followed, this court should grant the Writ and reverse.

ARGUMENT II

THIS COURT SHOULD GRANT THE PETITION BECAUSE THE MISSISSIPPI SUPREME COURT'S OPINION IS CONTRARY TO THIS COURT'S TEACHING ON THE MEANING OF UNITED STATES CONSTITUTION AMENDMENT FOURTEEN'S EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS CLAUSES.

Besides denying Petitioner's due process claim, the Mississippi Supreme Court also denied his equal protection claim. The record revealed that Parham was treated differently from one thousand one hundred ninety-four (1,194) inmates similarly situated. Since 1990, one thousand one hundred ninety-four (1,194) inmates had been released by order entered more than one hundred eighty (180) days after they were delivered to the Department of Corrections. The only difference between these one thousand one hundred ninety-four (1,194) inmates and Petitioner is that the error in the Parham case was by the trial judge, not by the

Department of Corrections.

The Mississippi Supreme Court held there is no equal protection violation since equal protection standards require a showing the difference is motivated by "a discriminatory purpose".

The necessity of a demonstration of a "discriminatory purpose" is in error since five (5) concurring opinions in Logan, held that arbitrary treatment violates the equal protection clause of the Fourteenth Amendment, without a showing of any discriminatory purpose. Obviously, where two (2) classes are treated differently because of administrative error, there is no "discriminatory purpose". Nevertheless, arbitrarily treating two (2) classes differently, even because of a state actor's negligent error, violates the Fourteenth Amendment, according to a majority of this Court:

> Justice Blackmun's concurring opinion in Logan states:
>
> "The state's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis. That is not so here".

102 S.Ct. at 282.

Similarly, Justice Powell's concurring opinion states:

> "The decision of the Illinois Supreme Court effectively created two (2) classes of claimants: those whose claims were, and those whose claims were not, processed within the prescribed one hundred twenty (120) days by the Illinois Fair Employment Practices Commission. Under this classification, claimants with identical claims, despite equal diligence in presenting them, would be treated differently, depending on whether the commission itself neglected to convene a hearing within the prescribed time...
>
> "The state no doubt has an interest in the timely disposition of claims. But the challenged classification failed to promote that end - or indeed any other - in a rational way. As claimants possess no power to convene hearings, it is unfair and irrational to punish them for the commission's failure to do so..."

102 S.Ct. at 283.

Five (5) Justices of this Court concurred in the opinions of Justices Powell and Blackmun. Thus, five (5) Justices agree that showing a discriminatory purpose is not a required element of an equal protection violation. The Mississippi Supreme Court has contradicted Logan when it denied relief because Plaintiff failed to demonstrate a "discriminatory purpose". Accordingly, this Court should grant the Writ and

hold that the equal protection and substantive due process clauses of the United States Constitution Amendment Fourteen are violated by a state's arbitrarily denying relief to an inmate where the judge fails to act in a timely manner, but grants relief where administrative officials fail to act in a timely manner.

Respectfully submitted,

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Appendix A

In The

Supreme Court of the United States

No.:_____

ROBERT DANIEL PARHAM,

Petitioner,

V.

STATE OF MISSISSIPPI,

Respondent.

APPENDIX "A"

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Appendix A

IN THE CIRCUIT COURT
OF MONROE COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI,

Plaintiff,

VS. **CAUSE NO. 12,985**

ROBERT DANIEL PARHAM,

Defendant.

OPINION AND ORDER

The Court has before it, the State's Petition to Vacate Void Orders, whereby the State seeks to have Defendant, Parham, re-incarcerated pursuant to an alleged procedural error in interpreting and applying Mississippi's earned probation statute. This matter was originally the subject of a Petition for Writ of Mandamus which was subsequently denied by the Supreme Court. However, this Court was instructed to conduct a hearing to determine whether its Order releasing the Defendant from the Mississippi Department of Corrections (MDOC), pursuant to Mississippi Code Ann. § 47-7-47, was void and without effect.

To facilitate an understanding of the complete picture, a

brief statement of how Defendant Parham ended up in the custody of the Mississippi Department of Corrections is appropriate. After being indicted on a charge of murder, Parham entered a plea of guilty to the reduced charge of manslaughter and was sentenced on January the 8th, 1993, to serve a term of ten years in the custody of the Mississippi Department of Corrections. The Court, pursuant to motion, reserved the right of judicial review. Accordingly, although this Court was contacted and advised of Parham's exemplary status as an inmate, along with other information received from the Mississippi Department of Corrections recommending his release, misplaced paperwork which prevented Parham's release until July the 19th, 1994. It is from this July 19th, 1994, Order suspending the balance of the sentence imposed on the Defendant that brings us to this current controversy.

CONTENTIONS OF PARTIES

The State, by and through the Attorney General, has petitioned this Court to vacate its Orders in this case dated July 19th, 1994, and August the 5th, 1994, which suspend the remaining balance of the Defendant's imprisonment and places him on five years supervised probation. The main, if

not only, contention by the State is that the Circuit Court had no inherent power to suspend the sentence of the Defendant in this case outside of the 180 day time limitation contained in Mississippi Code Ann. § 47-7-47. The State believes that the aforementioned statute gives the Court only the right to suspend further execution of a Defendant's sentence and place the Defendant on an earned probation, not earlier than 30 days, nor later than 180 days after the Defendant has been delivered to the custody of the MDOC. The State believes that the 180 clock imposed by § 47-7-47, began to run January the 29th, 1993, the date the Defendant was delivered to the MDOC facility. The State simply concludes that the latest date Parham's sentence could have been suspended was July 27th, 1993, exactly 180 days from the time of Parham's delivery to Parchman, Mississippi.

The Defendant's contention is twofold. First, the Defendant has moved this Court to dismiss this Petition to Vacate Void Orders based on constitutional grounds. The Defendant argues that his freedom is a liberty interest that he rightfully earned and he should not be required to forfeit that liberty interest when he has done absolutely nothing to occasion his arrest and subsequent re-incarceration,

presumably in maximum security as a prison escapee. Parham contends that misplaced paperwork and bad timing pursuant to an overly strict interpretation of a Mississippi statute should not be enough to cause him to again travel to Parchman as a "rehabilitated" inmate.

The second branch of the Defendant's attack requests the Court uphold its interpretation and utilization of the earned probation statute since it coincides with the statute's use and interpretation throughout Mississippi Circuit Courts. the Defendant believes that the ordinary, customary practice of allowing earned probation and suspension of sentence past the 180 day limitation is crucial to achieve the intended purpose of the earned probation statute and submits that the logistical problems in transference of inmates and awaiting timely reports from the MDOC makes it practically impossible to strictly comply with § 47-7-47.

THE EVIDENCE

At the hearing of this matter, the State introduced various documentary evidence which was admitted without objection. Of significance to our inquiry is the January 8th, 1993, Sentencing Order signed by this Court and reserving the right of judicial review, the commitment report dated

January 29th, 1993, this Court's July 19th, 1994, Order suspending the execution of Parham's sentence, and this Court's August 5, 1994, Order releasing Parham and placing him on earned probation. The State's prosecution of their Petition amounted to re-stating their position into the record, which, in its purest form, alleged that this Court had no authority to enter the July 19th and August 5, 1994, Orders which released Parham from prison. The State, reasoning that strict interpretation of Mississippi Code Ann. § 47-7-47, prohibited the Circuit Judge or any judge for that matter, from acting outside the 180 day time limit.

Subsequent to the State stating its position into the record, the Court proceeded to question the State's attorney as to when he believed the 180 day time period began to run according to § 47-7-47. The State responded that if given the most favorable interpretation in this case, that the time began to run on January the 29th, 1993, when Parham was delivered to the MDOC. When pressed regarding what the language, "initial sentencing" meant, the State, without clarity, provided that at least in this case the appropriate measurement time would still be at the time of delivery. This, of course, appeared as an admission by the State that at least

sub-section 2(a) of Mississippi Code Ann. § 47-7-47 was patently ambiguous and vague regarding any measurement of time periods.

The Defendant Parham, after arguing his Motion to Dismiss for constitutional reasons,[1] stated that he believed the evidence would prove he was a model inmate, caused no trouble, was not a threat to society and therefore a perfect example of why the earned probation statute was in existence. Further, the Defendant offered proof that since it was virtually impossible to comply with the strict time limit imposed by § 47-7-47, that a customary practice of suspending the execution of sentences outside of 180 days evolved. Ostensibly to confer a realistic and functional interpretation of the earned probation statute while minimizing the risk of prematurely placing inmates back into society without adequate counseling or observation. Parham also mentioned that the sentencing judge in this case had actually conferred with both a psychiatrist and the case manager, Suzi Steiger, regarding Defendant Parham back in

[1]On the day of the hearing, Parham filed his Motion to Dismiss based on constitutional grounds. For simplicity purposes, since all the facts of this controversy are closely interwoven, this Court will treat the Motion to Dismiss as another ground and reason for denying the Petition to Vacate rather than a separate motion necessitating a separate opinion and order.

1993, but due to misplaced paperwork, Parham's inevitable release was postponed until July 19th, 1994, at no fault of the Defendant.

WITNESS SUZI STEIGER: Witness Steiger testified that she had been employed with the Mississippi Department of Corrections for approximately 17 years. She was currently a case manager supervisor which supervises case managers and is involved in the treatment aspect of the Mississippi Department of Corrections. While Steiger does not deal directly with inmates in the Regimented Inmate Discipline program (RID), Steiger does evaluate and refer general population inmates to various treatment programs and also interviews case managers, psychiatrists, psychologists and other key individuals to determine whether any inmates under her control should be recommended for earned probation pursuant to § 47-7-47.

Ms. Steiger testified that she remembered inmate Parham and characterized him as, "the best of the best." When questioned as to what this actually meant, Steiger responded that he was the best acting, the best behaved, and the least dangerous. Steiger further testified that she had, in fact, recommended the release of Parham back in 1993 as she had

consulted both with Dr. Russell, who did the psychiatric evaluation of Parham, and also talked with this Court in 1993 and 1994 about Parham's release on earned probation.

Responding to counsel's questions concerning the application of § 47-7-47, Steiger that many inmates were released and the execution of their sentences suspended after the 180 day period had run. Steiger testified that the 180 day limitation period was plainly impractical. First, Steiger said that although an inmate may be sentenced on one date, the inmate may not be transferred to the general population (on shock probation and available for observation) until several months after he has been in Parchman. The inmate may be assigned to a drug or alcohol treatment program before being sent to general population. This takes time and a strict application of the 180 day rule would either cause an inmate to miss valuable counseling or be denied earned probation due to the MDOC's inability to evaluate him in a timely manner, once he is delivered to general population. Steiger testified that as many as three or four months may have already passed before she has the first opportunity to do any evaluation or meaningful observation on an inmate. In her plain words, it takes time. Steiger stated that according to her

experience, the custom and practice of the Mississippi Department of Corrections is to ensure that a thorough observation and evaluation is completed before considering a recommendation of release. Sometimes, she stated, this can be done within 180 days. However, Steiger also offered the opinion that she believed over one-half of the inmates released were released outside the 180 day period. Reasoning that the Department of Correction's inability to comply with the 180 day time limit was due to overcrowding and the fact that inmates must wait in county jails until Parchman has room for them.

Steiger, on cross-examination, in a somewhat irritated state, opined that good inmates, ready to be back in society after being in Parchman for only a short while, would end up being discriminated against due to a strict application of the 180 day limit contained in § 47-7-47. She reiterated that there were staff limitations at the Department of Corrections that prohibited her from doing all observation and interview work necessary for a competent recommendation on an inmate's release within the 180 day period. Ms. Steiger also noted that she knew of no other proceeding filed by the Attorney General's office on a former inmate. And when

asked whether the MDOC had changed their procedure regarding observation and recommendation of release to comply with § 47-7-47, Steiger responded, no, that compliance with the 180 day limit would be practically impossible, depending on the logistics of the prisoner's transfer to Parchman and his subsequent location in the general population, and the limitations of her staff and the amount of time it took to do competent reports regarding inmates and their eligibility for suspension of execution of their sentence.

Counsel for Parham introduced a computer printout of the Mississippi Department of Corrections entitled Offenders Sentenced to RID or Shock Probation on or After January 1st, 1990. This computer printout, which was stipulated as to authenticity, depicted a statewide compilation of inmates sentenced under RID or shock probation. The computer printout listed the "presumed" initial sentencing date, the sentence beginning date, county of conviction, the offense sentenced for and the exit date.[2] Performing some very simple computations, the Court determined that the percentage of inmates since January, 1990, which were

[2] Per information received from the Mississippi Department of Corrections, the exit date is the date that the inmate was released from the custody of the MDOC.

released outside of the 180 day time limit imposed by § 47-7-47 was 56.6 percent. If Parham is classified as an escapee, as the State suggests, then this percentage translates into an additional 1,894 inmate escapees, at large in the State of Mississippi or elsewhere, illegally released since January, 1990.

Parham also offered that as late as January the 11th, 1996, Mississippi courts continued to avoid the strict limitation period contained in § 47-7-47 and released inmates on earned probation after the 180 day period. As testified by Steiger, this practice has been ongoing for as long as she has been with the Department of Corrections.

WITNESS, WILLIAM "DOC" ROBBINS: Robbins testified he had been with the Mississippi Department of Corrections for approximately 16 years and is currently an area supervisor for the Department of Probation and Parole. Robbins testified that he had worked with various judges throughout several judicial districts and was familiar with the use of § 47-7-47. Robbins further testified that in his opinion the strict 180 day time limitation included in the statute was disregarded due to the inability for the system to facilitate a practical use of earned probation within the constraints of the

180 day limitation. Robbins went on and offered this opinion that this Court was merely interpreting and utilizing the statute as other courts have done throughout the state and emphasized that the Department of Corrections, was absolutely unable to keep track of any time calculation, and offered that if any records were kept, they might possibly be at Parchman.

ANALYSIS

INTRODUCTION

As we embark on our analytical journey for justice, we should again state the relative time frame and facts pertinent to the discussion of this case. We have already determined that the Order suspending the Defendant's sentence and directing him to report to probation officials was executed on July 19, 1994. An order suspending balance of sentence and placing Defendant on supervised probation was entered August 5, 1994. The Defendant was subsequently released on supervised probation.

The State took no legal action towards relieving the Defendant of his freedom until February 15, 1995, the date the Petition to Vacate Void Orders was filed. Presumably, (and there is no evidence to the contrary) the Defendant lived a normal, productive life during this interim period. Of

importance, this Court has never been confronted by the District Attorney's office with any request to challenge Parham's probation. In fact, even though the District Attorney's office had notice of Parham's release in July 1994, they never objected to Parham's release on probation and as of the date of this hearing have not joined in the Petition to Vacate Void Orders.[3]

Since there was testimony that this is the one and only time an inmate released pursuant to § 47-7-47 has been pursued by the Attorney General's office, this Court views the State's motive as somewhat suspect, particularly when weighing the constitutional gravity of this situation, and hearing undisputed proof on the Defendant's behavior and the non-action of the local District Attorney's office.

This Court mentions this to say that regardless of the final interpretation of § 47-7-47, and despite the Defendant's failure to pursue a claim of discrimination, the State's pursuit of this Defendant[4] smacks of selective prosecution, especially when this Defendant has done absolutely nothing

[3]See Robinson v. State, 585 So.2d 757, 760 (Miss. 1991) (Robertson, J., concurring) (Prosecution may waive its rights under section 47-7-33 and Circuit Court may accept and enforce such waiver).

[4]According to the evidence, if the State is correct in its assertion of the 180 day limitation period, there are approximately 1900 *(continued on next page)*

wrong or committed no act deserving revocation of his probation. The undisputed proof shows that Parham was an exemplary inmate. The "best of the best", and a member of the K-9 unit according to Steiger, the case manager supervisor. Further, the proof showed that the evaluating psychiatrist also opined that Parham was not a threat and could be moved back into society. The evidence is nothing short of overwhelming that Parham had earned probation.[5]

APPLICATION AND INTERPRETATION OF MISSISSIPPI CODE ANN. § 47-7-47; The State alleges in essence that this Court committed manifest error in proceeding under Mississippi Code Ann. § 47-7-47 to release an inmate outside of the 180 day period. Interestingly, the State accuses only the Court of wrongdoing but seeks to have the Defendant pay the price.

Mississippi Code Ann. § 47-7-47, known as the shock probation or earned probation statute reads as follows:

> § 47-7-47. Earned probation program; restitution to crime victim.

(continued from footnote 4): additional "escapees" throughout Mississippi. This Court finds it incredible that Parham is the only former inmate being pursued for re-incarceration.

[5]Further, this Court believes that if Parham was not able to retain his freedom on constitutional grounds, that the principle of estoppel might well prevent the State in succeeding to round up an "escapee."

(1) The judge of any circuit court may place an offender on a program of earned probation after a period of confinement as set out herein and the judge may seek the advice of the Commissioner of the Department of Corrections and shall direct that such defendant be under the supervision of the Department of Corrections.

(2) (a) Any circuit court or county court may, upon its own motion, acting upon the advice and consent of the Commissioner of the Department of Corrections at the time of the initial sentencing only, not earlier than thirty (30) days nor later than one hundred eighty (180) days after the defendant has been delivered to the custody of the Department of Corrections, to which he has been sentenced, suspend the further execution of the sentence and place the defendant on earned probation, except in a case where a death sentence or life imprisonment is the maximum penalty which may be imposed or where the defendant has been confined for the conviction of a felony on a previous occasion in any court or courts of the United States and of any state or territories thereof or has been convicted of a felony involving the use of a deadly weapon.

(b) The authority granted in this subsection shall be exercised by the judge who imposed sentence on the defendant, or his successor.

(c) The time limit imposed by paragraph (a) of this subsection shall not be applicable to those defendants sentenced to the custody of the Department of Corrections prior to April 14, 1977. Persons who are convicted of crimes that carry mandatory sentences shall not be eligible for earned probation.

(3) In the event the court should determine to place any person on probation or earned probation, the court may order such person, as a condition of such probation, to a period of confinement and treatment at a private or public agency or institution, either within or without the state, which treats emotional, mental or drug-related problems; provided, that any person who, as a condition of probation, is confined for treatment at an out-of-state facility shall be supervised pursuant to § 47-7-71 and any such person confined at a private agency shall not be so confined at public expense. Time served in any such agency or institution may be counted as time required to meet the criteria of subsection (2)(a).

(4) In the event the court should determine to place any person on probation or earned probation, the court may order such person to make appropriate restitution to any victim of his crime or to society through the performance of reasonable work for the benefit of the community.

(5) In the event the court should determine to place any person on probation or earned probation, the

court may order such person, as a condition of such probation, to submit, as provided in § 47-5-601, to any type of breath, saliva or urine chemical analysis test, the purpose of which is to detect the possible presence of alcohol or a substance prohibited or controlled by any law of the State of Mississippi or the United States.

As related in Smith v. State, 580 So.2d 1221, 1225 (Miss. 1991), the statute itself provides no objective criteria or narrow, clear language from which to construe the meaning of the statute. This Court has on several occasions struggled with the statute's application and meaning, and finds numerous construction issues in regard to the shock probation statute.

1. Can circuit and county courts suspend the further execution of the sentence and place the defendant on earned probation? § 47-7-47(1) states, "The judge of any Circuit Court may..."; (2)(a) states, "Any Circuit Court or County Court may...")

2. Is advice of the Commissioner of the DOC mandatory or discretionary? § 47-7-47 (a) states, "...the judge may seek the advice..."; (2)(a) states, "...acting upon the advice and consent...") Is the advice and/or consent given at the time of initial sentencing only, or between 30 days and 180 days after delivery to custody of the DOC?

3. When do the time restrictions of § 47-7-47 (2)(a) commence or begin to run? Is it at initial sentencing, time of Court's motion, time of advice and consent of Commissioner of DOC, or time defendant is actually delivered to the custody of DOC?

4. In § 47-7-47 (2)(a) does the provision "...After the defendant has been delivered to the custody of the DOC, to which he has been sentenced, ..." start the clock or does it mean at time of placing in custody of DOC at time of initial sentencing? Please consider the last sentence of § 47-7-47 (3). Also if a defendant is sentenced and recommended for RID and thereafter released on bond to call for a date to report or is incarcerated in a county jail for a period of time, does this "on bond time" or "in county jail time" count in figuring time restraints?

5. Does the Court lose jurisdiction after 180 days from whatever date you determine to be the "starting time" in those cases where the cause for delay is solely attributable to the DOC? (i.e. - overcrowding, failure to get a report or advise timely, failure to start and complete a RID program timely, etc.)

6. § 47-7-47 (2)(a) states that certain prisoners are not to be eligible for the earned probation program. Is a defendant who has a prior felony conviction and was placed on probation, but not "confined for the conviction," eligible of earned probation under this section if the second felony does not have a life or death penalty or mandatory sentence or is a felony

involving the use of a deadly weapon?

7. Does this section direct the Court to reserve the right of judicial review or make reference to this section in the original sentencing order?

While many of these issues will remain unsolved, the Supreme Court recently put to rest the issue regarding the 180 day time limitation.

In Wigginton v. State, Slip Op. 92-KA-00777-SCT, decided January 15, 1996, the Supreme Court examined a prisoner petition whereby the prisoner alleged his sentence should be vacated and set aside based on ineffective assistance of counsel and on involuntary guilty plea. While not mentioned in Wigginton's written motion, the issue of wrongful expulsion from the Regimented Inmate Discipline Program (RID) was argued at the hearing on June 22, 1992.

It appears Wigginton had been involved in an altercation while in the RID program and expelled. Thus losing the opportunity for early release. Finding no relief through Department of Correction's channels, Wigginton filed his Motion to Vacate and Set Aside his conviction and argued at the hearing that he had been wrongfully removed from the RID program and requested the Circuit Judge to consider this as an additional ground for vacating his sentence. The

Circuit Judge ruled that he lacked authority to review the procedures of the MDOC.

On appeal, the Supreme Court held that the Circuit Judge erred in finding that he had no jurisdiction to consider whether or not Wigginton's sentence could be reviewed under Mississippi Code Ann. § 47-7-47, and remanded the case back to the Circuit Court so Wigginton's sentence could be reviewed.

As quoted in Wigginton:

> Wigginton's rights in this setting are very limited, almost miniscule. Smith v. State, 580 So.2d 1221 (Miss. 1991). Nonetheless, the Circuit Judge clearly had the authority to inquire into Wigginton's sentence, and see if there was any basis at all for Wigginton's removal from the program, and it remains discretionary with the Circuit Judge to determine whether or not Wigginton's sentence should be reviewed.

Wigginton Slip Op., Page 6 (emphasis added).

With the Wigginton decision, the Mississippi Supreme Court, sitting en banc, unanimously decided the sole issue pending before this Court.

Does the Circuit Court have the authority to review a sentence and release an inmate pursuant to § 47-7-47 past the

180 day time limit? The answer is a resounding yes.

In reaching this conclusion, this Court considered that Wigginton entered the RID program on December 17, 1991. The Supreme Court ruled that the Circuit Court had authority to review, (and presumably to act) 197 days after Wigginton's delivery to MDOC, or 252 days after initial sentencing. Further, as late as January, 1996, a little over four years since Wigginton was "delivered" to the MDOC, well outside the 180 day limitation, the Supreme Court opined that the Circuit Court still had jurisdiction under § 47-7-47 to review an inmate's sentence.

This Court is of the opinion that further analysis is unnecessary. Especially in light of evidence that Parham's sentence was at least reviewed and acted on within four years as was the case in Wigginton.

Furthermore, the fact that the Supreme Court, in this case instructed the Circuit Court to hold a hearing at all strongly implies that this Court still has jurisdiction pursuant to § 47-7-47. Parham's sentence was not illegal. Neither was this Court's review of Parham's sentence and subsequent orders releasing him on supervised probation.

To conclude otherwise would be in direct conflict with

the January 25, 1996, decision of all nine of our Supreme Court Justices. This Court refuses to adopt an interpretation that is contrary to the law as pronounced by our highest court and contrary to the custom and practice of all Circuit Judges throughout Mississippi. There exists compelling evidence that to be able to carry out the true intent of the earned probation statute, that the MDOC and the courts must be flexible in the interpretation of a time limit. Logistical problems encountered in the assignment, transference, observation and evaluation of inmates makes strict compliance with § 47-7-47 almost impossible. An unjust result to be sure, but also a result that overlooks the worthy aspects of the RID and Shock Probation programs. To include a strict time element would, in effect, be an inclusion of an additional hurdle prisoners would have no way of clearing. They would be at the complete whim of the system and its given time barriers.

The relief sought in the Petition to Vacate Void Orders shall be and the same hereby is denied.

SO ORDERED this the 1st day of February, 1996.

/s/ Frank A. Russell
CIRCUIT COURT JUDGE

Appendix B

IN THE

SUPREME COURT OF THE UNITED STATES

NO.: _____

ROBERT DANIEL PARHAM,

PETITIONER,

V.

STATE OF MISSISSIPPI

RESPONDENT.

APPENDIX "B"

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Appendix B

IN THE SUPREME COURT OF MISSISSIPPI

NO. 95-M-00277-SCT

IN RE: ATTORNEY GENERAL MIKE MOORE

ON PETITION FOR WRIT OF MANDAMUS AND/OR OTHER APPROPRIATE EXTRAORDINARY WRIT

TRIAL JUDGE:	HON. FRANK ALLISON RUSSELL
COURT FROM WHICH APPEALED:	MONROE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	OFFICE OF THE ATTORNEY GENERAL BY: EDWARD A. SNYDER
ATTORNEY FOR APPELLEE:	FRANK ALLISON RUSSELL
NATURE OF THE CASE:	CIVIL-OTHER
DISPOSITION:	GRANTED - 9/24/98
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

BANKS, JUSTICE, FOR THE COURT:

¶1. In this case the State of Mississippi comes before the Court requesting by petition for extraordinary relief that this Court vacate certain orders by which the Circuit Court of

Monroe County had freed Robert Daniel Parham, who was incarcerated at Parchman. After consideration of the State's request and the pleadings filed by the respondents we conclude that the orders in question were entered without the authority of law and as such are void and must be vacated. It follows that Parham must be returned to the custody of the Mississippi Department of Corrections.

I.

¶2. Robert Daniel Parham was indicted for the murder of Cynthia Calcote by the Monroe County Grand Jury in October 1991. In December 1992, on agreed motion, Circuit Judge Frank A. Russell signed an order reducing the charge against Parham to manslaughter. Parham, represented by counsel, pled guilty to manslaughter shortly thereafter. On January 8, 1993, Judge Russell sentenced Parham to a term of twenty years in MDOC

> "with ten (10) years suspended pending future good behavior of the defendant. Further ordered to make restitution of $10,000.00 to Onnie Calcote for the use and benefits of the child of the deceased, Priscilla Calcote. Defendant further ordered to pay the court cost of $168.00. Both restitution and court cost to be paid in full today. The Court reserves the right of judicial review."

This language reserving to the circuit court the right of judicial review was also included on the prisoner commitment report.

¶3. On June 2, 1994, Robert Parham was considered for parole by the Parole Board and denied. Further consideration was continued for eighteen months. The reasons for denial were provided as follows: "Serious nature of offense; prior misdemeanor conviction(s); further investigation required; insufficient time served; the Board believes the ability of willingness to fulfill the obligations of a law-abiding citizen is lacking, pursuant to Section 47-7-17 of the Mississippi Code Annotated as amended."

¶4. On July 19, 1994, Judge Russell entered an order in which he stated that Parham had paid restitution and court costs in full. Judge Russell further stated that he had received a report from MDOC on Parham which was favorable as far as Parham's behavior and future prognosis. Judge Russell ordered that the balance of Parham's sentence be suspended pending Parham's good behavior and that Parham be placed on supervised probation for five years. Judge Russell ordered that Parham be released from MDOC immediately, and Parham was released on July 27, 1994. On

August 5, 1994, Circuit Judge Barry Ford entered a similar order concerning Parham. Judge Russell states that this was done simply to accommodate Judge Russell as Judge Ford was physically present in Monroe County "on the date that Defendant Parham reported from the MDOC for further orders in regard to probation" while Judge Russell was elsewhere in the district. Judge Russell states that Judge Ford was merely assisting him "by carrying out the intent and instruction" of the July 19 order, but "was not involved in any respect" with that order.

¶5. On February 15, 1995, the Attorney General's Office filed a Petition to Vacate Void Orders in Monroe County Circuit Court. The State alleged that Judge Russell and Judge Ford were without authority to review and alter Parham's sentence as they had done. Petitioner asked that the judges revoke and vacate the orders in question and that a bench warrant issue for Parham so that he might be taken into custody. On March 14, 1995, Judge Ford denied the petition as to his order.

¶6. The Attorney General's Office filed its Petition for Writ of Mandamus and/or Other Appropriate Extraordinary Writ with this Court on March 17, 1995. Petitioner stated that

Judge Russell had scheduled a hearing on the petition as to his order for March 29, 1995. Petitioner asked that this Court stay the March 29 hearing scheduled before Judge Russell, including any requirement that MDOC comply with a subpoena duces tecum that Judge Russell had issued, and order that Judge Russell and Judge Ford vacate or rescind the challenged orders and allow Robert Parham to be taken into custody by the MDOC. The hearing scheduled for March 29 did not take place. In September 1995 this Court denied the Attorney General's petition and ordered that a hearing on the Petition to Vacate Void Orders take place in the circuit court within sixty days.

¶7. On January 24, 1996, the circuit court held a hearing on the Petition to Vacate Void Orders filed by the Attorney General. Two witnesses were called: Susie Steiger, a case manager supervisor at Parchman, and William David Robbins, a field officer from the MDOC. Both testified that the release of inmates was not being handled within the time requirements of Miss. Code Ann. § 47-7-47. Judge Russell entered his order denying the petition on February 5, 1996.

¶8. On April 5, 1996, the Attorney General filed a Notification of Results of Hearing Ordered by Supreme

Court and Motion to Supplement Petition for Writ of Mandamus in this Court. The Petition asserted that the relief originally requested by the Attorney General was proper as Judge Russell had decided to petition filed in the circuit court. Judge Russell and Judge Ford filed a Motion to Dismiss and for Sanctions in this Court, alleging that the Attorney General's pleading was frivolous. The matter was considered by this Court en banc. By order dated January 13, 1997, this Court denied Judge Russell and Judge Ford's Motion to Dismiss and for Sanctions and granted Robert Daniel Parham leave to intervene.

II.

¶9. The issues presented have been clarified by this Court's decision in *Mississippi Commission on Judicial Performance v. Russell. 691 So.2d 929 (Miss. 1997).* Judge Russell cites three cases in his Brief Opposing Writ of Mandamus: Smith v State, 580 So.2d 1221 (Miss. 1991); Wigginton v. State, 668 So.2d 763 (Miss. 1996); and Russell. Both Smith and Wigginton were cited and discussed in Russell in a manner that is dispositive for this petition.

¶10. Judge Russell argues that Miss. Code Ann. § 47-7-47 is patently ambiguous and conflicting on its face. He relies on

this Court's comments in Smith v. State, 580 So.2d 1221, 1222 (Miss. 1991), where Smith, who pled guilty to house burglary and drug possession charges, was sentenced under the terms of § 47-7-47 and where the trial judge "reserve[d] the right to amend or modify this sentence if within 180 days the Defendant properly completes the RID Program." Smith was accused of a rules violation before completing the RID program, and as a result was placed in the general prison population without having his sentence amended or being placed on earned probation. He alleged that this removal from RID without a hearing denied his due process rights. This Court quoted the trial judge, who stated that

> [i]n practice, this somewhat awkward language has been considered authorization for the RID program to which some offenders are assigned by [the] MDOC, sometimes at the express direction or recommendation of the sentencing judge. There is no expression of MDOC 'advice and consent' at the time of [initial] sentencing. Success in RID determines whether [the] MDOC will recommend earned probation. In the inst[ant] case the sentencing order[s] expressly provided that Smith successfully complete RID.
>
> ....
>
> Section 47-7-47 contains no objective or criteria for determining whether the Department of Corrections should either grant or withhold a recommendation of

> probation to the court. Nor does it contain objective standards or criteria for determining whether the court should accept the advice and recommendations made by the MDOC. Rather, the statute vests absolute discretion in both the MDOC and the court.

Smith, 580 So.2d at 1224, 1226. As to Smith, this Court stated in Russell, 691 So.2d at 938:

> Judge Russell argues, citing Smith v. State, 580 So.2d 1221 (Miss. 1991) that § 47-7-47 contains "awkward language." While the language contained in this statute is not the epitome of clear drafting; it is obvious that some indication must be made at the time of the original sentencing. Moreover, each of the original sentencing orders in Smith contained the language "in the custody of the Miss. Dept. of Corrections under the terms and conditions of Miss. Code Ann., Sec. 47-7-47 (shock probation)...". *Id.* at 1222.

¶11. Judge Russell also continues to rely on Wigginton v. State, 668 So.2d 763 (Miss. 1996). This Court stated the following in Russell, 691 So.2d at 940-41, as to Wigginton:

> Judge Russell argues that this Court's decision in Wigginton v. State, 668 So.2d 763 (Miss. 1996) provides authority for his actions. Judge Russell interprets Wigginton to stand for the proposition that "a circuit judge *has* jurisdiction over a sentence, despite the fact that the 180 days described in § 47-7-47 has expired." Further, Judge Russell invites

this Court to clarify the "conflict" between Wigginton and earlier cases which suggest that a circuit judge has no such authority after the defendant has been sentenced. *See* Denton v. Maples, 394 So.2d 895 (Miss. 1981); Harrigill v. State, 403 So.2d 867 (Miss. 1981).

A close review of Wigginton and our prior cases reveals no conflict. In Wigginton, we were called upon to consider the plight of Bryan Scott Wigginton, an inmate **originally sentenced** pursuant to § 47-7-47. At the time of sentencing, the circuit judge reserved the right to review Wigginton's sentence for a period not exceeding 180 days, and upon the recommendation of MDOC, Wigginton was placed in the Regimented Inmate Discipline (RID) Program. Wigginton was involved in an altercation and placed into general population.

At a hearing held before the circuit judge, the matter of Wigginton's removal from the RID program was brought to the attention of the court. After taking the matter under advisement, the trial judge concluded that he had "no authority to review the procedure of the Mississippi Department of Corrections when a state prisoner feels that his rights have been violated or he or she has not been afforded due process." Wigginton, 668 So.2d at 764. This Court held "the circuit judge clearly has the authority to inquire into Wigginton's sentence, and see if there was any basis at all for Wigginton's removal from the program, and it remains discretionary with the circuit

judge to determine whether or not Wigginton's sentence should be reviewed." *Id.* at 765.

There are obvious distinctions between Wigginton and the cases under consideration. Foremost, the trial judge in Wigginton complied with § 47-7-47 at the time of the original sentencing when Wigginton was committed to the RID program. Moreover, we did not hold in Wigginton that the circuit judge could release Wigginton, but rather that the judge could **review** Wigginton's removal from the RID program to ascertain whether or not his due process rights had been violated by MDOC.

The situation in Wigginton is clearly different than what we are faced with today. Here, Judge Russell used nunc pro tunc orders to suspend sentences and place prisoners on probation after the time of the original sentencing. In Wigginton we simply held that the trial judge who had initially committed a prisoner to the RID program could review the prisoner's expulsion from that program in order to ascertain whether there was any basis for removal.

Judge Russell also argues that Wigginton indicates that there is no 180-day time limitation on the right to review the sentence of an individual sentenced under § 47-7-47. We did not so hold. Rather, we stated that the circuit judge retained discretion as to whether or not to review Wigginton's removal from the RID program when that judge had initially sentenced Wigginton to shock probation/RID. We did not hold that a judge has unbridled discretion to review and

suspend sentences regardless of the time limitations. To adopt this construction would be in direct conflict with § 47-7-47.

¶12. This Court concluded that "Judge Russell either knew or should have known that his actions were in excess of the authority and jurisdiction conferred upon him as a circuit judge." Russell, 691 So.2d at 948. This Court found that Judge Russell had no authority to release Robert Daniel Parham as he did.

III.

¶13. Robert Daniel Parham makes several arguments: first, that this Court is without jurisdiction at this point to hear the State's petition and grant requested relief. The Court found this argument without merit when it denied Judge Russell's Motion to Dismiss and for Sanctions. The second argument is that Judge Russell acted within his authority under Miss. Code Ann. § 47-7-47 when he ordered Parham released outside the 180 day limit. This argument was rejected by this Court in Mississippi Commission on Judicial Performance v. Russell. Parham's third argument is that to vacate Judge Russell's order at this point would result in a violation of Parham's due process and equal protection rights.

¶14. Parham first acknowledges that this Court, in Smith v. State, 580 So. 2d 1221 (Miss. 1991), found that there was no protected liberty interest in the right to earn a recommendation of probation by satisfactory completion of the RID program within 180 days, and therefore Smith could be removed from the RID program without a hearing. Parham also cites Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979), where the Supreme Court found that the Nebraska parole procedure, which afforded an opportunity to be heard and informed the inmate why parole had been denied, complied with required due process. Parham attempts to distinguish these two cases, saying that he, unlike Smith and the Nebraska inmates, has his freedom and therefore he cannot be re-incarcerated absent a violation of his constitutional rights.

¶15. Parham also cites Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), where Logan attempted to pursue a violation of the Illinois Fair Employment Practices Act by filing a complaint with the Illinois Fair Employment Practices Commission. The Commission was bound by

statute to hold a conference on the complaint within 120 days. The Commission failed to do so, and Logan's complaint was dismissed for lack of jurisdiction. The Supreme Court found that the State of Illinois had deprived Logan of a property right, and he was due a hearing "to present his claim of entitlement." Logan, 455 U.S. at 434. Parham says that he also would be denied due process where Judge Russell's delay in acting within the 180 day time period destroyed his remedy, or made void the order giving Parham his freedom.

¶16. The State relies on Fuller v. State, 100 Miss. 811, 57 So. 806 (1912), and Steadman v. State, 204 Miss. 322. 37 So.2d 357 (1948), for the proposition that an order which illegally suspends all or part of sentence is void, and any person free under such a void order has the same legal status as an escapee, and may be taken into custody without further hearing or court proceedings. *See also* Royalty v. McAdory, 278 So.2d 464 (Miss. 1973)(citing Steadman).

¶17. Neither party cites authority concerning the due process implications where a state official or body has erroneously, or without legal authority, given an inmate his

freedom and then the State subsequently attempts corrective measures. In Ellard v. Alabama Board of Pardons and Paroles, 824 F.2d 937 (11th Cir. 1987), Ellard was serving a life sentence and a concurrent twenty-two year sentence in Alabama. Ellard had also pled guilty to a murder charge in Georgia. In 1981, for unknown reasons, the Alabama Parole Board paroled Ellard and released him into the custody of the Georgia prison system to serve his Georgia sentence. After public protest the Parole Board sought to revoke the parole. Eventually the Board did revoke Ellard's parole and he was returned to Alabama. Ellard began legal proceedings in Alabama state court to have the parole revocation reversed. Failing to obtain relief there, Ellard began habeas proceedings in federal court. The federal district court found that Ellard did not have any liberty interest through the grant of parole; that he was not entitled to due process protection; and that there had been no equal protection violation in his treatment.

¶18. The Eleventh Circuit Court of Appeals reversed and remanded. It found first that "[t]hose liberty interests of prisoners that are protected by the fourteenth amendment

'arise from two sources--the due process clause itself and the laws of the State.'" Ellard, 824 F.2d at 941 (quoting Havitt v. Helms, 459 U.S. 460, 466 (1983). The court found in this case that the second source, the State of Alabama, had exercised its discretionary authority to grant parole to Ellard, and the question became "whether having exercised this discretionary authority, the Parole Board was constrained by 'substantive limitations' on its authority to rescind a parole decision." Ellard, 824 F.2d at 942. The court found that Ellard's parole "placed substantive limits on the state's authority to return him to an Alabama prison," and in view of the statutory restrictions on parole revocation, Ellard had a constitutionally protected liberty interest. Ellard, 824 F.2d at 943.

¶19. The question then became, what process was due to Ellard. Ellard argued that his parole had to be reinstated because he had committed no parole violation. The State argued that Ellard's parole was void and that revocation, after a hearing, complied with all due process requirements. The court stated:

> It is now well established that when a liberty

interest arises out of state law, the substantive and procedural protections to be accorded that interest is a question of federal law. *See* Bearden v. Georgia, 461 U.S. 660, 665 n.7, 103 S.Ct. 2064, 2069 n 7. 76 L.Ed.2d 221 (1983); Vitek v. Jones, 445 U.S. at 490-91, 100 S.Ct. at 1262-63; *cf.* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 540-42, 105 S.Ct. 1487, 1492-93, 84 L.Ed.2d 494 (property interest). Consequently, if Ellard was granted a valid parole, the substantive constraints of the due process clause would permit the parole to be rescinded only if Ellard violated a parole condition. *See* Bearden v. Georgia, 461 U.S. at 665 n. 7, 103 S.Ct. at 2069 n. 7; Douglas v. Buder, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973)(per curiam). This federal substantive limitation on the authority of a state to rescind a *valid* parole does not also suggest, however, that the state could rescind an *invalid* parole only upon the violation of a parole condition. There is little doubt, for example, that, consistent with the due process clause, a state could revoke a parole that was mistakenly granted to the wrong individual. Likewise, the due process clause would not prohibit a state from declaring void a parole that was granted in clear violation of the state's parole guidelines, where, as here, the parole stature expressly provides for such a contingency, *see* Ala. Code § 15-22-40.

Ellard, 824 F.2d at 945. Because the matter had been dismissed on the pleadings, it was remanded for an

evidentiary hearing, with the issue being defined as "whether, as a matter of state law constrained by the due process clause of the federal Constitution, the initial parole granted to Ellard was void." Ellard, 824 F.2d at 946.

¶20. A similar case, Kelch v. Director, Nevada Department of Prisons, 10 F.3d 684 (9th Cir. 1993), arose when Kelch, who had pled guilty to the second degree murder of his wife and had served two years of his sentence, was able to obtain a hearing before the Board of Pardon Commissioners despite lack of timely notice on the part of Kelch, as required by statute, to the appropriate district attorney. Kelch presented his case and received a reduction in sentence from twenty years to five. The district attorney, who did not attend, filed for reconsideration. A second hearing was held and the district attorney presented a much different picture of Kelch, resulting in the earlier commutation of sentence being rescinded. Kelch was denied relief in the state courts and filed for habeas relief in the federal courts. The district court found that Kelch had a liberty interest in the commutation of his sentence, but that there had been no denial of his due process rights due to the rescission of the commutation.

¶21. The Ninth Circuit affirmed, finding first that the Board of Pardon Commissioners had the jurisdiction to rescind the commutation, despite the absence of any explicit statutory or constitutional authority. Second, the court found that Kelch obtained a liberty interest when the Board issued its order commuting his sentence, which in turn entitled him to due process protection. The question raised here involved substantive due process, which

> requires that government action depriving a person of life, liberty or property have a rational, non-arbitrary connection to a legitimate purpose. *See, e.g.,* Kelley v. Johnson, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976); Jeffries v. Turkey Run Consolidated School District, 492 F.2d 1, 4 (7th Cir. 1974). "In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society.' "

Kelch, 10 F.3d at 688 (citations omitted).

¶22. The court compared Kelch's interest in his sentence reduction as originally ordered by the Board, a substantial one, to the State's interests in (1) appropriate punishment for criminals; (2) protection of the general population from such persons; and (3) a fair opportunity to present its case before

the Board and in conformity with statutory requirements. As (3) did not occur in this case, partially due to Kelch, the court found that the "balance of the competing interests" was in favor of the state. Kelch, 10 F.3d at 689.

¶23. In this case, it appears clear that Parham has a liberty interest in his freedom, having been released from Parchman in 1994, so that the State must afford Parham due process before it can revoke his release. This Court determined in Russell that, as a matter of state law, Judge Russell acted outside the authority granted to him by the Legislature in releasing Parham. That finding is affirmed here. Such an order is void, and void orders must be set aside. Since Judge Russell refused to do so, the State invoked a procedural remedy under M.R.A.P. 21.

¶24. Finally, as to whether the State's action in reincarcerating Parham has a rational, non-arbitrary connection to a legitimate purpose, the following interests are present. Parham has a substantial interest in retaining his freedom, as was noted in Kelch, 10 F.3d at 688: "Deprivation of liberty, next to deprivation of life, is the greatest punishment a state can impose upon an individual, and the

importance of regaining one's liberty should not be undervalued." The State has the following interests: (1) appropriate punishment for criminals; (2) protection of the general population from such persons, though this interest is probably not as strong as in Kelch, where Parham apparently has broken no laws since his release; and (3) having the law applied in a legal manner by the judiciary. As in Kelch, we find that the balance of interests favor the State.

¶25. Finally, Parham argues that he is being improperly singled out as the only inmate who is subject to a reincarceration action among the many who were allegedly improperly released by numerous judges pursuant to § 47-7-47. Parham relies on James v. Strange, 407 U.S. 128 (1972), where the Supreme Court found a Kansas statute which allowed for recoupment of costs of counsel from indigent criminal defendants while treating these "debtors" more harshly than the usual civil judgment debtor unconstitutional as a violation of equal protection.

¶26. The State cites Oyler v. Boles, 368 U.S. 448 (1962), Wayte v. United States, 470 U.S. 598 (1985), and United States v. Jennings, 724 F.2d 436 (5th Cir. 1984). The

applicable standard is provided in Wayte, 470 U.S. at 608-09, where the Supreme Court stated:

> [A]lthough prosecutorial discretion is broad, it is not "unfettered". Selectivity in the enforcement of criminal laws is...subject to constitutional restraints." United States v. Batchelder, 442 U.S. 114, 125 (1979) (footnote omitted). In particular, the decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification," Bordenkircher v. Hayes, *supra*, at 364, quoting Oyler v. Boles, 368 U.S. 448, 456 (1962), including the exercise of protected statutory and constitutional rights, *see* United States v. Goodwin, *supra*, at 372.
>
> It is appropriate to judge selective prosecution claims according to ordinary equal protection standards. *See* Oyler v. Boles, *supra*. Under our prior cases, these standards require petitioner to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979); Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

¶27. First, we find that the action proceeding here is a "prosecution" as contemplated by the rule just stated.

Assuming that there is a discriminatory effect, this Court has been presented with no evidence showing that the action against Parham was motivated by a discriminatory purpose. Parham's allegation of an equal protection violation is without merit.

¶28. This Court concludes that Judge Frank Russell released Robert Daniel Parham without any legal authority to do so. As such the orders of the Monroe County Circuit Court of July 19, 1994, and August 5, 1994, which ordered Parham's release, are declared void and are hereby vacated by this Court. This Court further orders that Robert Daniel Parham be immediately returned to the custody of the MDOC.

¶29. **PETITION FOR WRIT OF MANDAMUS AND/OR OTHER APPROPRIATE EXTRAORDINARY WRIT GRANTED.**

PRATHER, C.J., SULLIVAN AND PITTMAN, P.JJ., SMITH, MILLS AND WALLER, JJ., CONCUR. McRAE AND ROBERTS, JJ., NOT PARTICIPATING.